

## THE CONSTITUTIONALITY OF A BIOLOGICAL FATHER'S RECOGNITION AS A PARENT

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### Summary

Despite the increased recognition afforded to biological fathers as legal parents, the *Children's Act*<sup>1</sup> still does not treat fathers on the same basis as mothers as far as the automatic allocation of parental responsibilities and rights is concerned. This article investigates the constitutionality of the differential treatment of fathers in this respect, given South Africa's international obligations, especially in terms of the United Nations Convention on the Rights of the Child, to ensure that both parents have common responsibilities for the upbringing of their child. After a brief consideration of the constitutionality of the mother's position as parent, the constitutionality of the father's position is investigated, firstly, with reference to Section 9 of the Constitution and the question of whether the differentiation between mothers and fathers as far as the allocation of parental responsibilities and rights is concerned, amounts to unfair discrimination. The inquiry also considers whether the differentiation between committed fathers (that is, those who have shown the necessary commitment in terms of Sections 20 and 21 of the *Children's Act* to acquire parental responsibilities and rights) and uncommitted fathers may amount to discrimination on an unspecified ground. Since the limitation of the father's rights to equality may be justifiable, the outcomes of both inquiries are shown to be inconclusive. Finally, the legal position of the father is considered in relation to the child's constitutional rights – the rights to parental care and the right of the child to the paramountcy of its interests embodied in Section 28 of the Constitution. While there appears to be some justification for the limitation of the child's right to committed paternal care, it is submitted that an equalisation of the legal position of mothers and fathers as far as the automatic acquisition of parental responsibilities and rights is concerned, is not only justified but imperative if the constitutional rights of children are to be advanced and protected.

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**Keywords**

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